SUPREME COURT, U.S.
FILED
OCT 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-359

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

EASTWAY CONSTRUCTION CORP., et al.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETER L. ZIMROTH,
Corporation Counsel of
the City of New York,
Attorney for Petitioners,
100 Church Street,
New York, N.Y. 10007.
(212) 566-4328 or 4338

LEONARD J. KOERNER,*
FRED KOLIKOFF,
of Counsel.

October 2, 1987

*Counsel of Record

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PRELIMINARY STATEMENT

The petitioners, the City of New York, Nathan Leventhal, Anthony G. Gliedman, and Charles Reiss, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the

Second Circuit entered in the above-entitled proceeding on June 8, 1987. The Petition for a Writ of Certiorari was docketed in this Court on August 28, 1987. This Reply Brief is being submitted in support of the Petition and in response to the Brief in Opposition to the Petition, dated September 23, 1987, filed by Respondents (hereafter "Resp. br.").

ARGUMENT

Respondents' brief in opposition to the petition is based on a misrepresentation of the Second Circuit's decision which is the subject of this petition, a misrepresentation of petitioners' argument to his Court, and a misrepresentation of the relevant case law in the area.

1. Respondents misrepresent the decision below.

The decision which is the subject of the petition is Eastway Construction Corp. v.

City of New York ("Eastway III"), 821 F.2d 121 (2d Cir. 1987) (reprinted in the Appendix to the Petition at page A1). In that decision, the majority held that the District Court erred in awarding petitioners $1000 in attorney's fees under 42 U.S.C. §1988 and Fed. R. Civ. P. 11. The majority held that the fee award should be $10,000. However it did not explain why $10,000 was preferable to $1,000 or to the lodestar figure of $52,912.50. The majority explicitly disavowed any reliance on the factors that the District Court relied on in reducing the fee to $1000. Thus, the majority said, "Without necessarily endorsing the pertinence of each factor [relied on by the District Court Judge], we agree with his general conclusion that a fee substantially less than the lodestar amount is permissible". (A11) (emphasis added). The majority did not indicate which, if any, of the factors relied

on by the District Court formed the basis of its decision.

The dissent disagreed with the majority's unexplained award of an arbitrary figure which had no relationship to the lodestar. (A17-A27).

In their brief to this Court, respondents misrepresent the decision in Eastway III in two ways. First, their brief makes no reference to the vigorous and well reasoned dissent. Respondents' brief reads as if the dissent does not exist. Second, and more importantly, respondents pretend that the majority in Eastway III relied on and adopted the District Court's decision even though the majority increased the award by a factor of 10 and disavowed reliance on any of the District Court's factors. Respondents quote a passage from the majority decision at page 34 of their brief in support of this position. This

quotation is very misleading because the ellipsis masks the following critical phrase: "Without necessarily endorsing the pertinence of each factor [relied on by the District Court] ..." (A11).

It should be noted that petitioners are not alone in believing that the majority opinion in Eastway III fails to explain the factors on which the majority relied in fixing the award at $10,000 and hence is confusing and provides no guidance to other courts. One commentator has said, "[T]he 2d Circuit simply increased the fee from $1,000 to $10,000 ..., without any discussion or suggested criteria as to how or why Judge Weinstein's award was an abuse of discretion." Lawrence M. Greenberg, "The Rule 11 Debate, Circuit Gives No Guidance in Eastway," National Law Journal, September 14, 1987, page 19, col. 4, at page 22, col. 1.

2. Respondents misrepresent the petitioners' position.

Throughout their brief, respondents misrepresent petitioners' position and state that petitioners are arguing that, whenever a litigant is to receive a reasonable attorney's fee, the award must always be the lodestar. That is not petitioner's position. Petitioner's position is that the lodestar is presumptive the measure of a reasonable fee award. This presumption may be rebutted if evidence is submitted which will justify a lesser or greater award, but a court, in awarding a greater or lesser award, must articulate its reasons for doing so. See, Munson v. Friske 754 F.2d 683, 697 (7th Cir. 1985) ("[a] court must offer some articulation of the reasons supporting the amount of its award [citation omitted]."); Murphy v. Kolovitz, 635 F.2d

662, 663-664 (7th Cir. 1981) (since a prevailing plaintiff in a civil rights suit is presumptively entitled to an award of attorney's fees, a district court must articulate the special circumstances which warrant a denial of fees when it denies fees to such a plaintiff).

In Eastway III, the majority did not explain why it was awarding petitioners less than 20% of the lodestar. Given the decision below, petitioners cannot challenge the majority's reasons for reducing the award because it did not articulate them.[1] Therefore, we argue that the majority below

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[1] If the majority had relied on the District Court's analysis, petitioners would argue, as we argued before the Second Circuit, that this analysis should be rejected because some factors used by the District Court were improper, others were given too much weight, and as to others, no evidence was taken by the Court to justify its conclusions.

erred in not giving its reasons for diverging from the lodestar by 80%.

3. Respondents misrepresent the case law in this area.

In our Petition to this Court, we argued that Hensley v. Eckerhart, 461 U.S. 424 (1983), and its progeny, establish that the lodestar is presumptively the measure of a reasonable attorney's fee and a court should not diverge from the lodestar unless it can articulate a very good reason for doing so. (Petition, pp. 32-38). Respondents contend that these cases hold that the lodestar is merely an "initial estimate" or "first step" in computing a fee. (Resp. br., pp. 27-31). The fact that respondents are quite clearly wrong is demonstrated by the following passages from Pennsylvania v. Delaware Valley Citizens'

Council for Clean Air, ___ U.S. _____, _____, 106 S. Ct. 3088, 3098, (1986):

> We further refined our views in Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Blum restated that the proper first step in determining a reasonable attorney's fee is to multiply "the number of hours reasonably expended on the litigation times a reasonable hourly rate." Id., at 888, 104 S.Ct., at 1544. We emphasized, however, that the figure resulting from this calculation is more than a mere "rough guess" or initial approximation of the final award to be made. Instead we found that "[w]hen ... the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee" to which counsel is entitled. Id., at 897, 104 S.Ct., at 1548 (emphasis added). [Emphasis added].

Blum also limited the factors which a district court may consider in determining whether to make adjustments to the lodestar amount. Expanding on our earlier finding in Hensley that many of the Johnson factors "are subsumed within the initial calculation" of the lodestar, we specifically held in Blum that the "novelty [and] complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" from the litigation are presumably fully reflected in the lodestar amount, and thus cannot serve as independent bases for increasing the basic fee award. Id., at 898-900, 104 S.Ct., at 1548-1550. Although upward adjustments of the lodestar figure are still permissible, id., at 901, 104 S.Ct., at 1550, such modifications are proper only in certain "rare" and "exceptional" cases, supported by both "specific evidence" on the record and

> detailed findings by the lower courts. See Id., at 898-901, 104 S.Ct., at 1548-1550.
>
> A strong presumption that the lodestar figure - the product of reasonable hours times a reasonable rate - represents a "reasonable" fee is wholly consistent with the rationale behind the usual fee shifting statute, including the one in the present case. [Emphasis added].

* * *

The foregoing clearly shows that this Court has held that the lodestar is more than just a starting point for the calculation of a fee. Since this Court has held that there is a "strong presumption," Id., that the lodestar is a reasonable fee, the majority in Eastway III acted contrary to principles established by this Court in awarding petitioners only a fraction of the lodestar without articulating its reasons for so doing.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

PETER L. ZIMROTH,
Corporation Counsel of
the City of New York,
Attorney for Petitioners.

LEONARD J. KOERNER,*
FRED KOLIKOFF,
of Counsel.

*Counsel of Record

October 2, 1987